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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BETTY C. PHILLIPS,
Petitioner,

vs.

T.V.A. ENGINEERING ASSOCIATION, INC.,
VERNON DRAKE, JAMES EICKMAN, KEN SMITH,
KATHY WATSON, and PATRICIA LYON (CURETON),
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. §§ 636(c)(1) and (3) violate Article III of the United States Constitution by authorizing entry of final judgments and direct review in the courts of appeals upon consent of the parties by United States magistrates who do not enjoy the tenure or salary protection of Article III judges.

2. Whether the coerced reference supports the exercise of Article III jurisdiction by the magistrate.

3. Whether an award of attorney fees against petitioner is consistent with this Court's requirement that attorney fees should not be assessed against a Title VII claimant unless the claim is "frivolous, unreasonable or without foundation."

4. Whether the Sixth Circuit erred in failing to reverse as clearly erroneous the following mixed finding of fact and conclusion of law by the magistrate: "While it may be that Mr. Eickman's habit of handling money was an annoyance to Mrs. Phillips, and it may even be true that he said the words, 'Mrs. Phillips, do you want to make a little extra money?' this does not necesarily lead to the conclusion that Mrs. Phillips was sexually harassed."

5. Whether the Sixth Circuit erred in failing to reverse as clearly erroneous the magistrate's findings that retaliation was not a factor in petitioner's dismissal and that the preponderance of the evidence established that petitioner would have been discharged in the absence of her protected conduct.

6. Whether the trial of this case has been characterized by plain errors that seriously affect the fairness, integrity and public reputation of public proceedings and call for exceptional review by this Court to protect against fundamental unfairness in the proceedings of federal courts.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Betty C. Phillips, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 5, 1983. The Sixth Circuit denied a petition for rehearing *en banc* on January 26, 1984.

OPINION BELOW

The unreported opinion of the Court of Appeals appears in the appendix along with the final judgment of the United States magistrate, notice of appeal and other relevant documents from the Eastern District of Tennessee.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 5, 1983. A timely petition for rehearing *en banc* was denied on January 26, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

All statutes are reprinted in Appendix C.

STATEMENT OF THE CASE

On June 7, 1979, petitioner was hired by respondent Tennessee Valley Authority Engineering Association (T.V.A.E.A.) as a staff agent to represent grievant members of respondent association in arbitration proceedings against TVA. Respondent association is a union representing TVA employees. Prior to the period in controversy, petitioner received letters of commendation, three above-average service evaluations, five regular raises, one early raise and one promotion. Petitioner was the subject of no disciplinary action. T.10, 11, R. Ex. 2, 3.

Respondent James Eickman became petitioner's supervisor in February, 1980. T. 512. It is uncontradicted that respondent Eickman had the "unusual habit" of fingering rolls of bills during conversations. Appendix B-4 at A-18. T. 317, 504, 606. Although Eickman disputed the point, petitioner testified that respondent Eickman propositioned her soon after he arrived at T.V.A.E.A. T. 26. This conduct was repeated eight to ten times in 1980. T. 31. Seeking to discourage his advances without creating office tension, petitioner simply turned and walked away, much as one would hang up on an obscene phone call. Petitioner received a raise and promotion in January of 1981, and feeling a certain amount of job security, told respondent Eickman that his advances were improper and constituted sexual harassment. T. 32.

Rather than discontinuing his harassment, respondent Eickman retaliated; for the first time he began to find fault with petitioner's work and encouraged the escalation of the usual office tensions, knowing well petitioner's anxiety over his harassment. Although petitioner had missed only two days since her employment commenced, a secretary, Sue Rowe, "commented that the phone bills would be lower if Ms. Phillips would not call the office collect when she was on sick leave." Appendix A at A-2. T.537. Eickman permitted this unfortunate dispute to drag on and escalate. T. 537.

On March 6, 1981, respondent Eickman published productivity statistics on staff agents in the T.V.A.E.A. newletter, the Staff Reporter. Phillips Dep. 64-65. Eickman selected as the beginning day of the productivity period Friday, November 21, 1980—one day after petitioner had closed approximately twenty percent of her grievance case load. T. 540-41; R. 23. Eickman could not recall why he had selected November 21, 1980, as the first date of the productivity period. T. 542. No such productivity data had been published previously, and Eickman's reason for the publication was allegedly "to create a little competiveness . . . among the three staff agents." T. 544.

Petitioner excepted to Eickman's misuse of statistics. T. 88. Respondent Eickman called petitioner into his office and threatened to put a warning letter in petitioner's personnel file. T. 575-576. Respondent Eickman renewed this threat several times, adding to petitioner's anxiety, but each time petitioner responded that she would invoke her grievance rights and go the executive board if respondent put the letter in her file. T. 576. Respondent Eickman threatened to terminate petitioner if she exercised that right. T. 577. Respondent's threats to enter the warning letter in petitioner's file continued, increasing the tension. On May 11, 1981, petitioner requested a hearing by the executive committee, R. Ex. 15, and attended the May 15, 1981 meeting of the executive committee.

During petitioner's presentation she charged *inter alia* sexual harassment. T. 558. A four-member committee was appointed by respondent Drake to investigate petitioner's charges. Wendell Crisler, who chaired the committee, expressed the opinion that the real question to be addressed was whether the executive board would back petitioner or respondent Eickman. T. 488. The committee report (prepared by Crisler) took the position that no harassment occurred. T. 283, 284.

At the June 24, 1981 meeting the committee voted to terminate petitioner rather than follow the usual progressive disciplinary procedure used at T.V.A.E.A. R. Ex. 25. On the first vote the effort to terminate petitioner failed. T. 653, 654. However after additional discussion and pressure from respondent Vernon Drake a second vote was taken; petitioner was fired. T. 349, 655.

Petitioner received an E.E.O.C. right-to-sue letter and commenced this action on Jan. 12, 1982. Citing heavy docket pressures the district judge referred the case to the magistrate over the express objection of counsel for both parties. Appendix B-1. Counsel deferred to the bench order of the district court and executed the consent form allowing the reference. Appendix B-2. The pre-trial order of the magistrate directed counsel for both parties to enter proposed findings of fact and conclusions of law before trial. The case came on for trial on September 1, 1982, and over objection by petitioner was reopened on September 30, 1982, to allow respondent to correct certain false statements made by several of respondent's witnesses. Appendix B-3. The case was taken under advisement; on October 7, 1982, the magistrate found for respondents and granted leave to petition for attorney fees. Appendix B-4. On November 26, 1982, fees in the amount of $17,481.07 were awarded against petitioner. Appendix B-7. Following a timely appeal the Sixth Circuit affirmed the magistrate's order. Appendix A.

REASONS FOR GRANTING THE WRIT

1. Reference To A United States Magistrate For Entry Of Final Judgment And Direct Review In The United States Court Of Appeals On Consent Of The Parties, In Accordance With 28 U.S.C. §§ 636(c)(1) and (3), Violates Article III Of The United States Constitution.

The delegation of judicial power to magistrates under 28 U.S.C. §§ 636(c)(1) and (3)—even when supported by the prior consent of the parties—raises questions of immense significance regarding the structure and character of the federal courts. If the reference challenged by petitioner is permitted, the door is left ajar for docket-weary district judges to assign ever larger portions of their caseloads to an expanding legion of United States Magistrates. *Cf. La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). The incentive to assign even complex and controversial cases such as petitioner's to magistrates will increase with mounting docket pressures. The resulting bureaucratization of the district courts may satisfy substantial interests of efficiency and economy. But the delegation of Article III cases and controversies to Article I magistrates who lack the tenure and salary protections of Article III strikes close to the heart of the constitutional plan designed by the framers. Article I magistrates are far more susceptible to the influence of powerful factions and prestigous, politically influential attorneys than are Article III judges.

Reliance on the "good will of Congress" to preserve an indepenent federal judiciary and our nation's historic separation of powers, *Northern Pipeline Const. v. Marathon Pipe Line Co.*, 458 U.S. 50, 112 (1981) (White, J., joined by Burger, C. J., and Powell, J., *dissenting*), reflects a far more sanguine view of human nature than that of the framers. *See generally, THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (M. Farrand ed. 1937). Such reliance is at odds with the fundamen-

tal assumptions about political power and human nature that led the framers to establish constitutional protections to secure an independent judiciary. A shift from Article III judges to a salariat of United States magistrates may be welcomed by those who have long resented the lordly independence of Article III judges. Before relying too heavily on the good will of Congress to maintain an independent judiciary, this Court would do well to recall that no fewer than fifty-six constitutional amendments to limit or alter the life tenure of federal judges were proposed in the Congress between 1883 and 1963. W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY I at 326-36, II at 377-90 (1969). The primary response commanded by Article III to the increasing docket pressures in the district courts must be the appointment of additional Article III judges rather than the delegation of a growing percentage of cases or controversies in the district courts to Article I magistrates.

The importance of resolving the substantial jurisdictional issue counsels strongly in favor of granting the writ in this case despite the lack of success of Article III challenges in the court of appeals. *See In re Morrissey,* 717 F.2d 100 (3d Cir. 1983); *DeWitt v. Western Pacific Rail Co.,* 719 F.2d 1448 (9th Cir. 1983); *Marvel v. United States,* 719 F.2d 1507 (10th Cir. 1983); *Williams v. Mussomelli,* 722 F.2d 1130 (3d Cir. 1983); *United States v. Woodley,* 726 F.2d 1328 (9th Cir. 1983); *Oklahoma Health Services Credit Union v. Webb,* 726 F.2d 624 (10th Cir. 1984); *Goldstein v. Kelleher,* ____ F.2d ____, No. 83-1411 (1st Cir. 1984). The jurisdictional issue raised by petitioner is cognizable in this Court although first raised in this petition. *See Capron v. Van Noorden,* 6 U.S. (2 Cranch) 126 (1804) and *Glidden v. Zdanok,* 370 U.S. 530 (1962).

The writ should be granted because this case presents an important federal question left unanswered in *United States v. Raddatz,* 447 U.S. 667, 683 (1980): whether the "ultimate decision" of district courts can be delegated to a federal magistrate.

Cf. Northern Pipeline Const. v. Marathon Pipe Line Co., 458 U.S. at 73. In contrast to *Northern Pipeline* the delegation in §§ 636(c)(1) and (3) cannot be justified by considerations of "extreme specialization." *Cf. Northern Pipeline Const. v. Marathon Pipe Line Co.*, 458 U.S. at 118 (White, J., joined by Burger, C.J., and Powell, J., *dissenting*). It would be ironic if the "understandable desire to minimize existing burdens on federal district judges," *United States v. Raddatz*, 447 U.S. at 714 (Marshall, J., *dissenting*) became the mechanism through which the federal trial bench was divested of the essential and historic attributes of its independence under Article III. The political significance and controversial nature of petitioner's claims distinguish this case significantly from *Northern Pipeline*, 458 U.S. 116, 117 (White, J., joined by Burger, C.J., and Powell, J., *dissenting*).

The important differences between access to an Article III federal court of original jurisdiction and access to federal appellate courts strongly militate against accepting review by Article III appellate judges as an adequate substitute for consideration by an Article III trial judge.

The "full and effective utilization of United States magistrates" approved by the Judicial Conference of the United States, 1982 JUDICIAL CONFERENCE PROCEEDINGS 93, must be subordinated to the paramount constitutional interest in preserving access to Article III judges at the trial level. Magistrates can play an important role in assisting district judges with routinized tasks and minor hearings. The delegation to magistrates of controversial, complex and politically significant cases such as petitioner's transgresses the constitutional limits of Article III:

> The inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

THE FEDERALIST No. 78 (Hamilton) 471 (1961). Nor is an increasing reliance on magistrates in the district courts without obvious partisan implications. Is it not more likely that the enthusiasm by the Congress for creating additional federal judgeships will wax when the Congress and the President are of the same political party and wane otherwise. Assuming that partisan differences between control of the Congress and the presidency occur in the future with the frequency they have since the mid-twentieth century, we can realistically expect increasing reliance by the Congress on federal magistrates to avoid enhancing the judicial patronage of the opposition.

2. 28 U.S.C. §§ 636(c)(1) And (3) Are Invalid As Applied To The Facts Of This Case Because The Reference Was Coerced.

The reference in this case should be disapproved because petitioner's waiver was not voluntary. *See* Appendix B-1. *Cf. Schneckloth v. Bustamonte,* 412 U.S. 218, 229 (1973); *Bumber v. North Carolina,* 391 U.S. 543 (1968) and *Johnson v. Zerbst,* 304 U.s. 458 (1938).

When the district judge asked counsel if they would agree that this case be referred to the magistrate, lawyers for both petitioner and respondents objected. Appendix B-1 at A-6-7. Petitioner's trial counsel responded that this "is a complex matter" and that he would "feel more confident" with a court trial. Appendix B-1 at A-7. Counsel for respondent strongly objected to the reference. The district judge unequivocally indicated that the preference of the parties for trial by the court rather than reference to the magistrate would be subordinated to docket considerations:

> I am getting so many cases I can't try them all. That is the trouble. I would like to try them all, but you all are filing so many cases I just can't try them all....
>
> You all can come to me if you think that the magistrate has erred. You can come to me and I can—the only thing

> it does, if you come to me complaining of the magistrate's ruling, I would have to go into it again. But it would certainly shorten the matter for me....
>
> Don't put this on the record—used to be I would have 300 civil cases. Now it is running over 600. You can see . . . it is just getting more than—off the record—I hope we can get another judge here to help me. I hope we can. I don't know whether we can or not. The way things are going I just can't keep up. The docket is current now. But if it continues the way it is going, I don't know how long I can keep it current. I want it to remain current if possible.

Appendix B-1 at A-7-8. Actually, the district judge's initial request for agreement of counsel on the reference was only formal. He had already decided to refer the case because of docket pressures in the Eastern District of Tennessee irrespective of the wishes of the parties:

> THE COURT: Oh, you are not going to get in touch with all of them [i.e., clients]. I am not going to depend on you taking it up with 15 clients. That is out of the question. I thought you were going to take it up with your boss. *I am going to refer it anyhow right now.*

Appendix B-1 at A-9 (emphasis added). *Cf. Thermatron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976).

Petitioner was neither consulted nor advised in advance of the fact that her trial counsel had waived her right to seek review from the magistrate's judgment to the district court. Petitioner and her trial counsel relied on the assurance of the district judge that "[y]ou all can come back to me if you think that the magistrate has erred." Appendix B-1 at A-7. Apparently, petitioner's trial counsel did not read the waiver form with care prior to executing it because he was surprised on learning that he had waived review in the district court.

3. The Decision Below Affirming An Award Of Attorney Fees Against Petitioner Conflicts With Decisions Of This Court And Of Other Courts Of Appeals.

The magistrate's award of fees of seventeen thousand, four hundred eighty one dollars and seven cents ($17,481.07) affirmed by the Sixth Circuit was improper because petitioner's claim was not "frivolous, unreasonable or without foundation" as required by *Christianburg Garment Co. v. EEOC,* 434 U.S. 410, 421 (1978).

The award of fees here conflicts with the Fifth Circuit's holding in *Plemer v. Parsons-Gilbane,* 713 F.2d 1127 (5th Cir. 1983) that if plaintiff establishes a prima facie case, an award of fees to the prevailing defendant is improper. The magistrate conceded the proof of the elements necessary to establish a prima facie case of sexual harassment but declined to draw the required legal inferences. Appendix B-4 at A-18.

Neither the magistrate nor the court of appeals considered the financial impact of an award of fees on petitioner. However, in four circuits the wealth or poverty of the unsuccessful plaintiff must be considered. *See Arnold v. Burger King Corp.,* 719 F.2d 63 (4th Cir. 1983); *Badillo v. Central Steel and Wire,* 717 F.2d 1160 (7th Cir. 1983); *Charves v. Western Union Telegraph Co.,* 711 F.2d 462 (1st Cir. 1983); *Durrett v. Jenkins Brickyard Freeman Co., Inc.,* 678 F.2d 911 (2d Cir. 1982). Petitioner was generally unemployed during the interim between her discharge and the award of fees. The conflict among the circuits on whether the Title VII claimants' financial situation should be considered in determining either the propriety or the size of an award in favor of a prevailing defendant is one of substantial importance which deserves the attention of this Court.

Petitioner received a right-to-sue letter from the EEOC which neither the magistrate nor the Sixth Circuit considered in relationship to the propriety of an award of fees under *Christianburg.* The decision below, thus, conflicts with the positions of

the Seventh and Eighth Circuits. *See Badillo v. Central Steel and Wire Co.*, 717 F.2d 1160 (7th Cir. 1983); *Bowers v. Kraft Foods Corp.*, 606 F.2d 816 (8th Cir. 1979). *But see Charves v. Western Union Telegraph Co.*, 711 F.2d 462 (1st Cir. 1983).

The award of fees against petitioner is contrary to the "advice of competent counsel" standards used in the Fifth and Third Circuits. *See Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971) *aff'd mem.* 468 F.2d 951 (5th Cir. 1972) and *Hughes v. Repko*, 578 F.2d 983 (3rd Cir. 1978).

The Sixth Circuit did not consider whether the award of fees should have been entered against petitioner's trial counsel either jointly or singly as is the practice in the Fifth and Second Circuits. *See Lewis v. Brown and Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983) and *Hastings v. Maine-Endwell School Districts*, 676 F.2d 893 (2nd Cir. 1983).

Petitioner believed at the time she filed her action, and believes today, that her claim has merit. Neither the Sixth Circuit nor the magistrate considered petitioner's perception of the merits of her claim at the time of filing. Sixth Circuit practice thus conflicts with the practice of the District of Columbia, Fourth and Seventh Circuits. *See Harris v. Group Health Association*, 662 F.2d 869 (D.C. Cir. 1981); *Lotz Realty Co., Inc. v. United States Department of Housing and Urban Developement*, 717 F.2d 929 (4th Cir. 1983) and *Badillo v. Central Steel and Wire*, 717 F.2d 1160 (7th Cir. 1983). *Cf. Christianburg Garment Co. v. E.E.O.C.*, 434 U.s. at 421, 422.

Six years have passed since this Court's decision in *Christianburg*. The disparate treatment of attorney fees in Title VII cases in the several circuits has created substantial uncertainty among the bar about the desirability of accepting Title VII cases. It has chilled the assertion of Title VII claims and undermined the congressional purpose of placing a high priority on the vindication of sex discrimination claims. The petition for certiorari should be granted to bring the disparate constructions of 2000e-5(k) into harmony and to correct manifest injustice to petitioner.

4. The Magistrate's Findings Against Petitioner On Her Claims Of Sexual Harassment Were Clearly Erroneous, And The Sixth Circuit Erred In Affirming Those Findings.

The magistrate found that respondent Eickman "has the rather unusual habit of fingering rolls of bills when talking." Appendix B-4 at A-18. The Sixth Circuit erred for failing to reverse as clearly erroneous the following mixed finding of fact and conclusion of law:

> While it may be true that Mr. Eickman's habit of handling money was an annoyance to Mrs. Phillips, and it may even be true that he said the words, "Mrs. Phillips, do you want to make a little extra money?" this does not necessarily lead to the conclusion that Mrs. Phillips was sexually harassed.

Appendix B-4 at A-18.

Eickman's conduct toward petitioner plainly constituted sexual harassment under 29 C.F.R. § 1604.11(a)(1983): "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. The application of an improper legal standard to historical facts constitutes reversible error under the clearly erroneous rule. *Danzl v. North St. Paul-Maplewood-Oakdale Independent School District,* 706 F.2d 813 (8th Cir. 1983); *International Travel Arrangers, Inc. v. Western Airlines, Inc.,* 623 F.2d 1255 (8th Cir.), *cert. denied* 449 U.S. 1063 (1980); *Cf. Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844 (1982).

There was uncontradicted testimony that Eickman had made gestures of money to at least two females other than petitioner—respondent Watson and Ms. Hodges. T. 191, 316-17, 646. Thus, the magistrate's finding that the only corroboration

of petitioner's charges of sexual harassment was Eickman's "unusual habit" is clearly erroneous. Watson and Hodges stated that they regarded Eickman's gestures of money as "kidding" or a "joke." The differential effect of Eickman's "unusual habit" on different females is understandable: one person's "vulgarity is another's lyric." *Cohen v. California,* 403 U.S. 15, 25 (1971).

The magistrate's finding that petitioner fabricated her charge of sexual harassment at the May 15 meeting, Appendix B-4 at A-20, is clearly erroneous because if conflicts with his finding, *supra* Appendix B-4 at A-18. Petitioner's reluctance and delay in making the harassment charges do not reflect unfavorably on her veracity, but favorably on her sensitivity. Much as a rape victim may feel unwarranted shame and self-doubt, the victim of sexual harassment may be reluctant to discuss or even admit sexual harassment's emotional violation of self.

5. The Sixth Circuit Erred In Failing To Reverse As Clearly Erroneous The Magistrate's Findings That Retaliation Was Not A Factor In Petitioner's Dismissal And That The Preponderance Of The Evidence Established That Petitioner Would Have Been Discharged In The Absence Of Her Protected Conduct.

Respondent association had a progressive discipline system that consisted consecutively of oral warning, written warning, suspension and, finally, termination. If an employee of respondent association differed with a supervisor, the proper recourse was to the executive committee. T. 171, 184-85, 201, 491. No warning had been given to petitioner or entered in her file prior to her discharge, T. 589, other than the threatened written warning she appealed to the executive committee on May 15, 1982. Other employees were accorded the benefits of the progressive discipline system. T. 505-07, 509-10, 590-91, 594-95. R. Ex. 25. Eickman recommended that petitioner be fired because he opposed petitioner's going over his head to the executive committee to object to his entry of a warning letter in her file. T.

199-200. The finding against petitioner on the question of retaliation is clearly erroneous because of the uncontradicted testimony that the respondent association did not follow the procedures of its progressive discipline system with petitioner.

The finding of the magistrate that there was sufficient evidence to support the termination of petitioner apart from retaliation is clearly erroneous. Petitioner would have been entitled to the benefits of the progressive discipline system which at worst could have resulted in a temporary suspension following her appeal of Eickman's threatened written warning. There is no evidence whatsoever in the record to justify discipline of petitioner subsequent to her appeal of May 15, 1982, *other than her claim of sexual harassment. Cf. Thompson v. Louisville,* 362 U.S. 199 (1960).

6. The Trial Of This Case Has Been Characterized By Plain Errors That Seriously Affect The Fairness, Integrity And Public Reputation Of Public Proceedings And Call For Exceptional Review By This Court To Protect Against Fundamental Unfairness In The Proceedings Of Federal Courts.

This case was the *first* trial which petitioner's counsel had conducted in the United States court. Viewed most charitably, petitioner's inexperienced trial counsel critically prejudiced her case by failing to authenticate important documents corroborating her claims. He waived her right to review in the district court without her advice or consent. He was all too often ineffective in protecting petitioner's most compelling interests of personal dignity. Consider, for example, the following colloquy at trial:

Q. How many times in your life has someone offered to go to bed with you in any manner whatsoever other than your husband?

A. I think that's personal and I don't have to answer that.

Mr. Bernstein: Well, may it please the court, I think how this woman reacts to conduct is very important.

The Witness: Okay, I will withdraw my—

The Court: Well, one of the issues here is whether or not—is how this was all perceived. So I think that it is proper and I will require the witness answer.

T. 55, 56. *Compare* F.R. Ev. 412. *Cf. Griswold v. Connecticut,* 381 U.S. 479 (1965) and *United States v. Ney,* 661 F.2d 1203 (10th Cir. 1981). Before trial, petitioner had testified under oath that Eickman had not touched her. Phillips Dep. 34. While respondent's counsel probed the most fundamental privacies of petitioner's life, petitioner's trial counsel sat mutely without asserting a claim of constitutional privilege, relevance or even suggesting that under the circumsatances the prejudice to petitioner outweighed probative value. *See also* T. 102, 128; Phillips Dep. 71 (Mr. Bernstein to petitioner: "Do you know what paranoia is?")

Sound recordings of the meetings of respondent association of May 15, June 24 and 25, 1981, were made by its secretary, Dianne Gilbert. T. 668. *The tapes contain very significant admissions against interest by defendants, which have substantial probative value on the merits of petitioner's claims and the credibility of respondent's witnesses.*

On August 23, 1982, petitioner's trial counsel moved for an order to subpoena witnesses "outside the 100 mile district limit but whose testimony is crucial to pltf. action." Civil Docket Entry in No. 3-82-21 (E.D. Tenn. August 23, 1983) (Ms. Gilbert, who made the tapes of the three meetings of respondent association, had moved to Decatur, Alabama.) The magistrate filed an order denying the motion that following day. Petitioner's trial counsel moved at pre-trial and before the magistrate in open court for the admission of the tapes or their written transcription. T. 286-88. Despite their immense value

to petitioner on the merits and on the crediblity of respondent's witnesses, the audio tapes were not properly authenticated, due to the inexperience of petitioner's trial counsel. Petitioner's trial counsel was of the impression that Gilbert could not be subpoenaed "because she was out of the district . . . [o]ver a hundred miles." T. 668. *But see* F.R. Civ. P. 30(b)(1), (5), (6) and 45(b). Debbie Warwick, a secretary who had worked seven years at respondent association and could recognize the voices on the tapes, was called as a witness but curiously was dismissed without authenticating her transcription of the tapes. T. 690-92. Defendants' counsel objected to the introduction of the tapes "because they have not been authenticated," T. 667, and because of their alleged "confusion." T. 598. It is unclear whether the magistrate considered the tapes or transcriptions in entering final judgment although he recognized that the tapes could constitute admissions, T. 350, and on another occasion stated: "I will be glad to listen to this portion of the tape if you can find it." T. 599.

The public interest in the vindication of meritorious Title VII claims is sufficiently compelling to empower federal district courts "*to appoint counsel* . . . [and] to authorize the commencement of the action without the payment of fees, costs, or security and even to allow an attorney's fee." *Johnson v. Railway Express Agency,* 421 U.S. 454, 459 (1975) (emphasis added). Occasional judicial intervention to assure the effectiveness of counsel for Title VII claimants is essential to the effectuation of the important public policies recognized in *Johnson.* The plain error of petitioner's trial counsel was so egregious that it effectively deprived petitioner of her day in court: Petitioner's trial counsel failed to authenticate audio tapes that contained critical admissions against interest by respondents, corroborated petitioner's case and raised serious doubts as to the credibility of some of respondent's witnesses. Remedial relief can and should be available especially where as here the plain error is raised on direct rather than collateral review. Like the petitioner in *Boyd v. Dutton,* 405 U.S. 1

(1972), petitioner's trial counsel on the issue of the authentication of the tapes ". . . was utterly lost . . . [H]is assertion that favorable witnesses existed was frustrated because he did not know how to compel their attendance and received no assistance in this respect. . . ." 405 U.S. at 3 (Blackmun, J., *concurring*).

If the tapes were not properly authenticated due to the inexperience of petitioner's trial counsel, an opportunity should be afforded for their proper authentication to prevent manifest injustice to petitioner and to preserve the appearance of fairness in the federal courts. *Cf. Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946) and *Sibbach v. Wilson*, 312 U.S. 1, 16 (1941).

Alternatively, the Court might hold that there is sufficient basis in the record for finding that the tapes and/or the Warwick transcriptions thereof are authentic. *Cf. U.S. v. Biggins*, 551 F.2d 64 (5th Cir. 1977). The Warwick transcriptions were used extensively in examination and cross examination by both parties. T. 122, 124, 127, 286-88, 298-99, 300-01, 345-45, 349-56, 403, 426, 429, 488-96, 578-80, 598-99, 667-70. Should the Court hold that the tapes or the Warwick transcriptions are authentic on grounds of estoppel or otherwise, this case should be remanded for reconsideration in light of the significant admissions against interest in the tapes.

The tapes offer very strong corroborating evidence of retaliatory dismissal. Respondent Eickman stated to respondent association's executive committee at its meeting of May 15, 1981:

> Last Monday night I had a meeting with her [petitioner] after work from 4:30 to about 6. I asked her to back off. I told her the letter that I issued her would stand, but I did not want her to come before the Executive Committee and ask that it be removed because if she did then I am going to bring up all these other things that have happened since the last Executive Committee meeting . . . . Now I offered her

last Monday night, I said "back off Betty uh take the letter." It's by the way the letter is the shortest possible form of discipline. It's uh set for six months. It expires on September 16. I said "be cool, you know we are going to tear it up we are going to forget everything about it on September 16, and I will forget everything that has happened since the last Executive Committee meeting. And she said "no" "no I won't take the letter in the file. I won't take it and I am bringing it all before the Executive Committee." Since then I understand she has contacted various Executive Committee members and Vernon over my head and I would point out to you that you can't run an office that way. We don't have to put up with this.

Tape of T.V.A.E.A. meeting of May 15, 1981, Warwick Transcription at 9-10.

The tapes cast very substantial doubt on the magistrate's resolution of issues of credibility against petitioner. The alleged lack of corroboration of petitioner's testimony on sexual harassment influenced the magistrate to resolve the credibility issue against petitioner. *See also* Appendix A at A-5. There are, however, several admissions against interest in the tapes of the T.V.A.E.A. meetings which corroborate petitioner's charges. Consider, for example, the following dialogue at the executive committee meeting of May 15, 1981:

Phillips: . . . . Ever since Jim Eickman came to work in our office he keeps a roll of money in his pocket. A roll of bills. He has pulled that roll of money out, he's offered it to Isabell, he's offered it to me, he's offered it to Brenda, he's offered it to Kathy and asked us would we like to make some money? Could we use some money?

Drake: There's one you left out. Me.

Phillips: OK. He may have offered it to you, Vernon, but I'm not going

Drake: There's also one other, too. Jim Hemphill.

[?:] Pat.

Drake: I've heard the same comments. He's made it to Patricia. I don't know of anybody that he hasn't made that

Phillips: I'm not going to cross that line, Vernon, as far as the men are concerned, but as far as the women in our office are concerned for him to pull money out of his pocket and to offer ti to any of us when he's in a supervisory position this is sexual harassment plain and clear.

Tapes of T.V.A.E.A. meeting of May 15, 1981, Warwick Transcription at 72.

Consider, also, the following colloquy in the tape of May 15, 1981 meeting, Warwick Transcription at 91:

Phillips: Isabell has seen you do it to me, Jim. I've seen you do it to Kathy. I've seen you do it to Brenda.

Watson: There never was any doubt that we were kidding.

The following dialogue casts substantial doubt on the magistrate's finding that petitioner was the cause of office unrest:

Searcy: Have you known that office to run smooth?

Drake: That's not fair. I could say when I was in charge of it.

Searcy: You had it for a while.

Drake: I would say that when I was in charge of it it run like a damn greased machine.

Searcy: But you know that ain't true.

Drake: It would be a lie. Cause I don't believe that office ever can run smooth because you've got too many women in one place. I said that just to get em all ralled.

Miller: Well, it's the truth.

Searcy: Nobody gossips more than women do.

Lyon: That's not true.

Watson: Myth. You all have done that more than any of us.

Drake: Notice how quick they got ralled up.

Mr. Battles: Too many Executive Committee members to talk to.

Searcy: Maybe if we had all male secretaries.

Drake: Shit no. It would just be just as bad I believe we got all male secretaries.

Miller: That office runs smooth every December 25th when they close it.

Drake: And January 1st.

Miller: I don't know, I've never been there on any of those days.

Drake: Neither has anybody else. That the reason why it runs smooth.

Tape of Meeting of May 15, 1981, Warwick Transcription at 36-37.

The following dialogue between petitioner and Eickman occured at the May 15, 1981, meeting shortly after petitioner made her sexual harassment charge:

Phillips: Jim, it's not merely a case of looking at dollar bills. It's a case of offering those dollar bills to all of the females I mentioned.

Eickman: Yeah. I have done that to several people.

[?:] That's right.

[?:] That's right.

Eickman: But there's no intent there.

Tape of T.V.A.E.A. meeting of May 15, 1981, Warwick Transcription at 93.

The tapes also suggest that the attribution of coarse language to petitioner in the magistrate's final judgment may be more reflective of the usage of respondent's witnesses than of petitioner. *See* T. 695-96.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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**NOTICE PURSUANT TO 28 U.S.C. § 2403(a)
AND CERTIFICATE OF SERVICE**

Pursuant to 28 U.S.C. § 2403, counsel for petitioner affirms that he has certified to the Attorney General of the United States petitioner's challenge to the constitutional validity of 28 U.S.C. §§ 636(c)(1) and (3) facially and as applied to the facts of this case by serving on the Solicitor General of the United States three copies of this petition for certiorari in accordance with SUP. CT. R. 28(b). Three copies of this petition have been served on counsel for respondents, Bernard E. Bernstein, Esquire, Bernstein, Susano, Stair and Cohen, Sixth Floor, First Tennessee Bank Building, Knoxville, TN 37902. One copy of this petition has been served on petitioner's counsel below, Kevin March, Esquire, 10805 Kingston Pike, Suite 2, Knoxville, TN 37922.

Done this day of April 1984.

FREDERIC S. LE CLERCQ
Attorney for Petitioner

by: St. Louis Law Printing Company

APPENDIX

APPENDIX A

Opinion Of The United States Court Of Appeals For The Sixth Circuit December 5, 1983

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5663

Betty C. Phillips,
Plaintiff-Appellant,

v.

TVA Engineering Association, Inc.,
Vernon Drake, James Eickman,
Ken Smith, Kathy Wilson, and
Patricia Lyon (Cureton),
Defendants-Appellees.

On Appeal from the
United States District
Court for the Eastern
District of Tennessee,
Northern Division.

Before: MERRITT and KENNEDY, Circuit Judges; and PRATT,* District Judge.

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* Honorable Philip Pratt, United States District Court for the Eastern District of Michigan, sitting by designation.

PER CURIAM. Betty Phillips appeals a judgment for the Tennessee Valley Authority Engineering Association, Inc. (TVAEA) in her suit under Title VII of the Civil Rights Act of 1964 for sexual harassment and unlawful realiation. She also appeals an award of attorney's fees to TVAEA. We affirm the decision of the District Court.

Appellant Phillips began employment in June 1979 as a staff attorney with TVAEA, a labor organization that represents certain employees of the Tennessee Valley Authority. She was terminated in June 1981. Ms. Phillips had satisfactory work evaluations through December 1981, though there was testimony that she had had difficulty with staff relations during that time. Beginning in February 1981, Ms. Phillips had some disagreements with other members of the TVAEA staff. At a meeting on February 5 the staff discussed the office's long distance telephone bills. A staff assistant, Ms. Rowe, commented that the phone bills would be lower if Ms. Phillips would not call the office collect when she was on sich leave. This remark angered Ms. Phillips, who wrote the assistant a note saying that her remarks were "defamatory and slanderous" and threatened to file suit. Ms. Phillips wrote a second letter on this matter to Ms. Rowe on February 12.

In March 1981, the Executive Director of TVAEA, James Eickman, published a series of statistics in an in-house newspaper giving the status of each staff attorney's caseload for a certain period, showing the number of grievances handled and closed by each. Ms. Phillips had closed out 17 cases the day before the starting date of the period. Consequently, it appeared from the statistics that Ms. Phillips was not handling as many cases as she actually was. Ms. Phillips in response sent a memo to the Executive Committee of TVAEA stating that she believed the publication to be "libelous and slanderous."

Mr. Eichman met with Ms. Phillips on March 16, 1981 in the presence of Vernon Drake, the President of TVAEA, to reprimand her for threat of suits against himself and the staff assistant Ms. Rowe.

During this time relations at TVAEA were tense. There was testimony that Ms. Phillips was not speaking to some members of the staff. The Executive Committee met on March 19, 1981. It discussed the problems at TVAEA, and concluded that Ms.

Phillips was the source of tension in the office. The Committee advised Mr. Eickman to take action to remedy the situation.

Mr. Eickman arranged a meeting with himself, Ms. Phillips, and Mr. Drake. This meeting lasted for two hours. Mr. Eickman warned Ms. Phillips that she was perceived as a problem and was in danger of being fired. Ms. Phillips indicated that she would not accept Mr. Eickman's criicisms. She swore and threatened to sue Mr. Eickman. Mr. Eickman later had other meetings with Ms. Phillips. She continued to deny any blame for the office tensions and threatened to sue Mr. Eickman.

The Executive Committee met on May 15, 1981, at which time Mr. Eickman recommended Ms. Phillips' termination. He presented a report concerning Ms. Phillips' misconduct. Ms. Phillips was then invited to address the Committee, and did so for at least an hour and a half. She first presented general grievances regarding her work situation, and responded to questions from the Committee. Then at the end of her presentation she charged that Mr. Eickman had harassed her sexually by holding money out to her, standing very close to her, and saying in a low voice, "Would you like to make a little extra money?" She said that Mr. Eickman had first done this in February of 1980, and had repeated such actions several times.

The Executive Committee determined that it could not act upon the proposed termination of Ms. Phillips without investigating her charges of sexual harassment. A committee of four was set up to investigate the charges. This investigative committee spoke with each TVAEA employee, asking questions regarding the office situation generally and specifically with regard to any sexual harassment. Ms. Phillips had stated that a co-worker had also been harassed sexually, but the co-worker denied this and denied any knowledge of Ms. Phillips having been harassed. The committee found that there was no evidence of sexual harassment.

The investigative committee made a report to the Executive Committee in June 1981 regarding Ms. Phillips' sexual harassment charges. The Executive Committee then considered the matter of Ms. Phillips' termination pursuant to the recommendation that Mr. Eickman had made in May. The Committee voted to terminate Ms. Phillips on the basis of misconduct.

Ms. Phillips brought suit against TVAEA and the individual defendants under Title VII of the Civil Rights Act of 1964 for sexual harassment and unlawful retaliation. The case was heard before a magistrate who found for the defendants. In addition, he awarded defendants attorney's fees on the basis of *Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 422 (1978), which allows attorney's fees to defendants in Title VII cases when the plaintiff's action was frivolous, unreasonable, or without foundation. The magistrate found that "Mrs. Phillips' accusations of sexual harassment are lacking in credibility and wholly unfounded." He suggested that she "fabricated the sexual harassment charge at the May 15, 1981 meeting of the TVAEA Executive Committee for the sole purpose of blocking an action on Mr. Eickman's part to terminate her employment."

The sole question for review in this case is whether the magistrate's findings of fact were clearly erroneous. Fed. R. Civ. P. 52. The magistrate determined that Ms. Phillips was not sexually harassed by Mr. Eickman, and that Ms. Phillips was not wrongfully discharged in retaliation for having filed sexual harassment and discrimination charges with the EEOC. We have reviewed the record and the findings do not appear to be clearly erroneous.

Ms. Phillips presented no corroborating testimony regarding her charge of sexual harassment. There was considerable testimony that Mr. Eickman had a nervous habit of fingering rolled bills while talking, but only Ms. Phillips claims that he ever offered money in return for sexual favors. There was testimony that Ms. Phillips had said on November 26, 1980, following a TVAEA meeting on sexual harassment, that she had

never been sexually harassed, and that no decent woman would be sexually harassed. This meeting was ten months after Mr. Eickman's first alleged advance. Through the period during which Ms. Phillips claims that she was being harassed there was no evidence that she complained of harassment to anyone at or outside of TVAEA, and there was considerable testimony that Ms. Phillips was generally very outspoken on all matters. She regularly rode to work with another employee to whom she had never mentioned this complaint.

With respect to Ms. Phillips' claim of retaliation, Mr. Eickman had presented the Committee with a report of her misconduct and recommended that Ms. Phillips be terminated before she made her charge of sexual harassment at the May 15, 1981 Executive Committee meeting. The Committee declined to vote on her termination at that time in view of the seriousness of her charges. It voted to terminate only after the investigative committee interviewed the entire TVAEA staff regarding the sexual harassment charges and the more general office tensions. There is considerable testimony that Ms. Phillips was experiencing significant interpersonal difficulties at TVAEA which would have justified her termination. Thus, the magistrate was not clearly erroneous in his findings.

With respect to the award of attorney's fees to defendants, *Christianburg* does authorize such an award in Title VII cases when the plaintiff's suit is groundless, as the magistrate found Ms. Phillips' suit to be. In light of the entire record it appears that this finding as well was not clearly erroneous.

Accordingly, the judgment of the District Court is affirmed.

APPENDIX B-1

Transcript Of Proceedings On Reference Of Case By The District Court To The Magistrate March 24, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. 3-82-21

Betty Phillips,
Plaintiff,

v.

TVA Engineering
Association, et al,
Defendant.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS

March 24, 1982

(At 9:00 o'clock a.m. on Wednesday, March 24 1982, court convened pursuant to adjournment before the Honorable Robert L. Taylor, Judge of the United States District Court, when the following proceedings were had:)

* *

THE COURT: Would you all agree for the magistrate to hear this case?

MS. ALLEN: Your Honor, I discussed this with our clients prior to coming to the pretrial conference, because we thought it might come up, and they have advised me they have a lot of confidence in you as the judge, and they would prefer for you to try it. I am—

THE COURT: I am getting so many cases I can't try them all. That is the trouble. I would like to try them all, but you all are filing so many cases I just can't try them all.

MS. ALLEN: We didn't file this one, Your Honor. We are defending it. So we would just as soon not be here too.

MR. MARCH: I can appreciate your problem. Of course, my client wishes this hadn't happened.

THE COURT: Can't you agree to—

MR. MARCH: We could ask you to consider whether you think you can hear it. I will bow to your judgment, Your Honor. I personally feel it is a complex matter.

I would feel more confident in front of you, but will bow to your judgment and agree to what you think is best.

THE COURT: You all can come to me if you think that the magistrate has erred. You can come to me and I can—the only thing it does, if you come to me complaining of the magistrate's ruling, I would have to go into it again. But it would certainly shorten the matter for me.

MR. MARCH: Your Honor, if it would aid you we would agree to a hearing before the magistrate.

MS. ALLEN: In view of the fact our clients have instructed our office not to refer it to the magistrate, if you would like, I would like to have an opportunity to discuss it with them further and I will try to convince them to do it—

THE COURT: Tell them you can come to me. Don't put this on the record—used to be I would have 300 civil cases. Now it is running over 600. You can see—

MS. ALLEN: Yes, Your Honor.

THE COURT: —it is just getting more than—off the record—I hope we can get another judge here to help me. I

hope we can. I don't know whether we can or not. The way things are going I just can't keep up. The docket is current now. But if it continues the way it is going, I don't know how long I can keep it current. I want it to remain current if possible.

MS. ALLEN: Yes, Your Honor.

THE COURT: That is not you all's trouble. That is not you all's trouble. I don't want to—

MR. MARCH: Would Your Honor like—

THE COURT: —put the trouble on you.

MR. MARCH: Would Your Honor like to go ahead and hear the motion today and get back—

THE COURT: I would like to hear your side of it. That's right. And I will hear hers. What is your name, Ma'am?

MS. ALLEN: Doris Allen, Your Honor.

THE COURT: Of course, I am going to give her time to take it up.

MR. MARCH: Fine.

THE COURT: You are going to your chief counsel? What is his name?

MS. ALLEN: Mr. Bernstein. He talked to them about it also.

THE COURT: I thought you were the TVA attorney.

MS. ALLEN: No, Your Honor. We are a separate organization from T.V.A.

(Other matters taken up before the Court afterwhich the following proceedings were had.)

THE COURT: Now, Mrs. Allen—is it Allen?

MS. ALLEN: Yes.

THE COURT: When will you take that up with your boss?

MS. ALLEN: He is in Florida this week. So I will be taking it up with Mr. Bernstein when he returns. But I will try to get in touch with the clients before that. If the Court—

THE COURT: Don't take it up with clients. They know nothing about that. Just take it up with your boss.

MS. ALLEN: All right. It will be in a week when he returns. He is on vacation.

THE COURT: Oh, well, if you take it up with your clients and they say that is all right could you let us know now?

MS. ALLEN: Oh, yes, Your HOnor he will leave it up to me to deal with the clients in his absence. That is no problem. But we do have clients that live in five different states and we have 15 people we represent. So it will take us a little bit to get in touch with all of them.

THE COURT: Oh, you are not going to get in touch with all of them. I am not going to depend on you taking it up with 15 clients. That is out of the question. I thought you were going to take it up with your boss. I am going to refer it anyhow right now.

We will take a recess.

(A recess was taken afterwhich other cases were called.)

* * * * * * * * *

CERTIFICATE

I, EDWIN ROBERSON, Official Court Reporter for the United States District Court for the Eastern District of Tennessee, Northern Division, do hereby certify that the foregoing pages constitutes a true and correct transcription of my shorthand notes.

WITNESS MY HAND this the 11th day of April, A. D., 1984.

EDWIN ROBERSON, CSR, RPR,
Official Court Reporter
U. S. District Court
Knoxville, Tennessee

APPENDIX B-2

Order of Reference to the Magistrate
April 5, 1982

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

March 24, 1982

Civil Action No. 3-82-21

Betty Phillips,
Plaintiff,

vs.

TVA Engineering Association, Inc., et al,
Defendant.

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

In accordance with the provisions of Title 28, U.S.C. §636(c), the parties in this case hereby voluntarily waive their rights to proceed before a judge of the United States District Court and consent to have a United States Magistrate conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

Signature:	Attorney For:
Doris C. Allen	all defendants
Kevin E. March	plaintiff

ELECTION OF APPEAL TO DISTRICT JUDGE

(Do not execute this portion of the Consent Form if the parties desire that the appeal lie directly to the court of appeals.)

In accordance with the provisions of Title 28, U.S.C. §636(c)(4), the parties elect to take any appeal in this case to a district judge.

ORDER OF REFERENCE

IT IS HEREBY ORDERED that this case be referred to United States Magistrate ROBERT P. MURRIAN for all further proceedings and entry of judgment in accordance with Title 28, U.S.C. §636(c) and the foregoing consent of the parties.

/s/ Robert Taylor
United States District Judge

Note: Return this form to the Clerk of the Court only if all parties have consented to proceed before a magistrate.

APPENDIX B-3

Magistrate's Memorandum and Opinion
September 22, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. Civ. 3-82-21

Betty Phillips,
Plaintiff,

vs.

TVA Engineering Association, Inc., et al.,
Defendants.

MEMORANDUM AND ORDER

Before the undersigned is the defendants' motion to reopen this action for the taking of additional testimony. The plaintiff opposes the motion. This action was tried on September 1, 2 and 3, 1982, without a jury and was taken under advisement at the conclusion of final arguments. The motion to reopen was filed on September 9.

At issue here is a meeting which several of the defendants testified occurred on January 6, 1981. The gist of their testimony was that Mrs. Phillips told the witnesses at that meeting, or just after it, that she had never been sexually harassed and that no virtuous woman would be sexually harassed. In rebuttal, Mrs. Phillips proved that she was out of town on January 6, 1981, and therefore could not have been at the meeting. She said on redirect that she had never said that women who get sexually harassed "ask for it."

The defendants claim that they were surprised that she denied even being at the meeting and that they can show that she did participate in a November 26, 1980, meeting concerning sexual harassment.

Whether or not the plaintiff made the aforementioned statements is very relevant information, because she testified that she began to be sexually harassed months before November 26, 1980. The defendants have taken the position throughout this litigation that the plaintiff's sexual harassment charge was only an afterthought she concocted in May 1981 after it became apparent that she would be fired. The plaintiff, on the other hand, takes the position that sexual harassment began shortly after James Eickman became executive director of TVAEA in February 1980 and that the defendants are "out to get her" by concocting testimony like that surrounding the alleged January 6, 1981, meeting.

The decision to reopen a record for the purpose of taking additional testimony is addressed to the sound discretion of the presiding judicial officer. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 803 (1971); *Calage v. University of Tennessee*, 544 F.2d 297, 301-302 (6th Cir. 1976).

In the present case, the credibility of the witnesses will be a decisive factor. Due to the nature of the charge (sexual harassment, in many respects, the proof boiled down to the plaintiff's word against that of the defendants. Uppermost in the trial of any case must be the search for the truth. The undersigned is of the opinion that the defendants were genuinely surprised at Mrs. Phillips' rebuttal testimony and that time constraints prevented a full airing of the facts and circumstances surrounding the alleged meeting at which she allegedly made the statements. In the undersigned's opinion, a limited reopening of the record is consistent with fairness and substantial justice for the limited purpose of exploring the facts and circumstances

surrounding the alleged meeting at which the plaintiff allegedly made the aforementioned statements.

Accordingly, it is ORDERED that the record be, and same hereby is, RE-OPENED for the limited purpose described above. Counsel should promptly consult with the undersigned's staff to schedule further proceedings consistent herewith.

/s/ Robert P. Murrian
United States Magistrate

APPENDIX B-4

Magistrate's Memorandum Opinion, October 7, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

No. Civ. 3-82-21

Betty Phillips,
Plaintiff,

vs.

TVA Engineering Association, Inc., et al.,
Defendants.

MEMORANDUM OPINION

This is an action for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.,* for sexual harassment, wrongful termination of employment and unlawful retaliation. 42 U.S.C. §2000e-2 (a) (1) and §2000e-3 (a). Jurisdiction is predicated on 42 U.S.C. §2000e-5 (f). This case was tried from September 1, 1982 through September 3, 1982, without intervention of a jury. The record was re-opened on September 30, 1982, for the taking of additional testimony. The following constitutes the undersigned's findings of fact and conclusions of law. Rule 52(a), Federal Rules of Civil Procedure.

Plaintiff Betty Phillips was hired on June 7, 1979, by the defendant TVA Engineering Association, Inc. (TVAEA), a labor organization representing employees of the Tennessee Valley Authority. She worked for TVAEA as a staff agent until her termination on June 30, 1981 (effective July 21, 1981). During her employment, she received satisfactory service reviews,

several within-grade pay raises, and a promotion to a higher grade which entailed a pay raise. From approximately February of 1980 until her termination, defendant James Eickman was Executive Director of TVAEA and her immediate supervisor.

Two issues of fact are before the undersigned; these will be examined in turn.

1. Was Betty Phillips sexually harassed by her supervisor James Eickman?

Mrs. Phillips testified that in February of 1980, while she was standing in the hall outside the director's office, Mr. Eickman came unreasonably close to her, extended a roll of bills, and said, in a coy and sexually suggestive voice, "Mrs. Phillips, would you like to make a little extra money?" She testified that she was upset by this but did not say anything because he was a new director, and she simply turned around and left. Mr. Eickman continued to do this sort of thing, she testified, making her nervous and causing an old ulcer to flare up. Over a period of almost a year, Mrs. Phillips claims to have endured 8 or 10 similar advances responding each time by simply leaving the scene. At no time did Mr. Eickman touch her. Mrs. Phillips said that out of fear for her job and fear of ridicule from co-workers, she said nothing about these incidents until near the end of January 1981. Finally, she testified that she told Mr. Eickman that she did not like his behavior; that he should please keep his money in his pocket; and that somebody might file an EEOC claim against him for sexual harassment. According to Mrs. Phillips, it was after this confrontation that things started to deteriorate for her on the job. For example, she said that Mr. Eickman began to blame her for the tension and dissension in the TVAEA office; began to scrutinize her work and her time schedule; and began a general campaign to denigrate her work. The prime example of this, she said, was the publication of statistics which suggested that Mrs. Phillips' grievance case load was relatively less, in comparison with those of other staff agents, than it actually was.

In March of 1981, Mrs. Phillips claims to have told three people from the TVAEA Executive Committee (Pat Lyon Cureton, Kathy Watson, and Ken Smith) about her sexual harassment problems but that these individuals did not take her seriously.

The undersigned finds that no such revelation occurred in March 1981 and that Mrs. Phillips' accusations of sexual harassment are lacking in credibility and wholly unfounded.

Mrs. Phillips is a lawyer and a sophisticated, mature woman, adept at negotiating labor relations problems, and capable of protecting herself from unpleasant or offensive situations. The only testimony in the record which might corroborate her claims was the undisputed fact that Mr. Eickman has the rather unusual habit of fingering rolls of bills when talking. Defendant Kathy Watson testified that she had observed him fingering bills while addressing the Executive Committee, and that she had seen him playfully extend money to his daughter and then snatch it back when she made a grab for it. While it may be that Mr. Eickman's habit of handling money was an annoyance to Mrs. Phillips, and it may even be true that he said the words, "Mrs. Phillips, do you want to make a little extra money?", this does not necessarily lead to the conclusion that Mrs. Phillips was sexually harassed.

Neither Mr. Eickman himself, nor Kathy Watson, nor Pat Lyon Cureton, nor Ken Smith remember hearing Mrs. Phillips mention that she had been sexually harassed by Mr. Eickman at any time before the May 15, 1981, accusation at the Executive Committee meeting. In fact, in an informal discussion following a meeting on the topic of sexual harassment on November 26, 1980 (after 10 months in which Mrs. Phillips allegedly was being subjected to Mr. Eickman's sexually suggestive offers of money), Mrs. Phillips told the group that she had never been sexually harassed; that women who are harassed ask for it; and that, in her opinion, no virtuous woman would be sexually harassed. This was an unlikely statement from one who was herself silently enduring sexual harassment.

There is much in the record to suggest that Mrs. Phillips fabricated the sexual harassment charge at the May 15, 1981 meeting of the TVAEA Executive Committee for the sole purpose of blocking an effort on Mr. Eickman's part to terminate her employment.

Mrs. Phillips worked in the area of labor relations, and was fully aware of the leverage that threatened legal action could give her. Her testimony concerning how she finally rebuked Mr. Eickman's sexual harassment is indicative of how she handled inter-personal conflicts. She testified that she said "somebody might file an EEOC claim against you for sexual harassment." While, in the opinion of the undersigned, that conversation either never took place or took place in some other context, the record is clear that she openly or impliedly threatened lawsuits on many occasions. An unfortunate remark made at a staff meeting by a Ms. Sue Rowe was handled with the threat of a defamation action and constant reminders that the statute of limitations had not yet run. Mr. Eickman's publication of the statistics concerning relative grievance case loads was responded to by a memorandum of March 6, 1981, accusing him of intentionally using "biased, slanted and libelous statistics." On March 16, 1981, in a meeting with Mr. Eickman and Vernon Drake (held for the purpose of warning Mrs. Phillips that further threats against members of TVAEA would result in her termination), Mrs. Phillips said, "If you discharge me, I'll file a lawsuit against you and have your ass in court." At the May 15, 1981, Executive Committee meeting in which several hours were devoted to Mr. Eickman's attempt to put a warning letter in Mrs. Phillips' personnel file and his recommendation that she be terminated, Mrs. Philiips advised the TVAEA Executive Committee that she intended to file sex harassment charges against Mr. Eickman and that they, as his employer, were also liable for his behavior. In a lengthy memorandum of July 6, 1981, she made it clear to the Executive Committee that those who had voted for her termination had committed an illegal act and that any attempt to terminate her

after she had filed charges with the EEOC was a violation of the Civil Rights Act, the United States Constitution, and the laws of the State of Tennessee. She advised them that they could still rectify the illegality by reappointing her and that, if they did not do so promptly, there would be major publicity through television and newspapers which would undermine the credibility and effectiveness of the TVAEA. The probability that Mrs. Phillips fabricated the sexual harassment charge with the idea that any subsequent termination would be subject to question as a "retaliatory discharge," is further underscored by her revealing statement in the July 6 memorandum, "Just to keep the record straight, I had filed the EEOC charges before you voted to terminate me...."

2. Was Mrs. Phillips wrongfully discharged in retaliation for her having filed sexual harassment and discrimination charges with the EEOC?

While there is evidence in the record that certain members of the TVAEA Executive Committee were persuaded to vote to terminate Mrs. Phillips on the strength of the special investigative committee's finding that "[t]here is absolutely no verification that would even remotely tend to support Ms. Phillips charge of sexual harassment," that does not necessarily indicate that she was terminated for filing these charges. There was abundant evidence in the record to indicate that Mrs. Phillips was in some form of conflict with every member of her staff with the possible exception of staff agent Jim Hemphill. She had overtly threatened to sue Ms. Rowe and implicitly threatened to sue Mr. Eickman before the March 16 meeting with Eickman and Drake. At that meeting, according to Mr. Eickman's memorandum,

> Betty was told in no uncertain terms I would no longer tolerate any threats against me or any member of the staff. Reference was made to her threat to file a lawsuit against Sue Rowe and her threat against me in labeling my report

> in the Staff Reporter on grievance handling by the Staff Agents as "libelous and defaming her character."
>
> Betty was told that any further incidents of this type involving threats or her inability to get along with other staff members (interpersonal relations) would subject her to further disciplinary action up to and including termination.

It is evident that Mrs. Phillips was in considerable danger of losing her job as a result of her stormy interpersonal relations. The Supreme Court has already considered the problem of termination for a combination of reasons when at least one reason is impermissible (in this case retaliatory discharge). *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 97 S.Ct. 568 (1977) was a case where a dramatic and abrasive incident was clearly on the minds of those making an employment decision and undoubtedly played a part in their decision not to rehire even though they probably would have reached the same decision if the incident had not occurred. The Court held that once a plaintiff has shown that constitutionally protected conduct was a substantial factor in the employment decision, the employer can relieve himself of liability if he can show by a preponderance of the evidence that it would have reached the same decision in the absence of that protected conduct. 429 U.S. at 287, 97 S. Ct. at 576. *Accord: Givhan v. Western Line Consolidated School Dist.,* 439 U.S. 410, 99 S.Ct. 693 (1979).

The facts of the instant case reveal that Mr. Eickman recommended Mrs. Phillips' termination at the May 15, 1981, Executive Committee meeting. Because she then accused him of sexual harassment, the Committee postponed its decision, convened an investigative committee, and did not vote on her termination until it had the findings of this Committee before it at its June 25, 1981, meeting. The undersigned is of the opinion that the EEOC charges filed by Mrs. Phillips on June 22, 1981, were not a "substantial factor" in the decision to terminate Mrs. Phillips' employment. But, assuming, *arguendo,* that this

filing *was* a substantial factor, the defendants have shown by a preponderance of the evidence that Mrs. Phillips would have been discharged in the absence of this protected conduct.

On the basis of the foregoing findings of fact and conclusions of law, judgment will enter in favor of the defendants. Rule 58 (1), Federal Rules of Civil Procedure.

In the instant action, the defendants moved for an award of attorney's fees and costs pursuant to 42 U.S.C. §2000e-5 (k). This provision of the Civil Rights Act allows the Court the discretion to award reasonable attorney's fees upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422, 98 S.Ct. 694, 700 (1978). The undersigned is of the opinion that the instant action is one of those rare cases in which the prevailing defendants are entitled to such an award.

The defendants may file a petition for attorney's fees within ten days of the filing hereof. Such petition will be supported by a verified and detailed itemization of the time expended and expenses incurred in connection with defense counsel's activities in this action.

FILE: Oct. 7, 1982

/s/ Robert P. Murrian
United States Magistrate

APPENDIX B-5

Final Judgment by the District Court, October 7, 1982

UNITED STATES DISTICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION

No. Civ. 3-82-21

Betty Phillips

vs.

TVA Engineering Association, Inc., et al.,

JUDGMENT

This action came on for hearing before the court, United States Magistrate Robert P. Murrian presiding. The issues having been duly tried (heard) and a decision having been duly rendered, **it is ordered and adjudged** that plaintiff take nothing, that the action be dismissed on the merits, and that the defendants recover of the plaintiff, BETTY PHILLIPS, the costs of this action.

It is further Ordered and Adjudged that the defendants may, within 10 days hereof, petition the court for attorney's fees supported by a verified and detailed itemization of the time expended and expenses incurred in connection with defense in this cause.

Dated at: Knoxville, Tennessee *Date:* October 7, 1982

KARL D. SAULPAW, JR.
Clerk of the Court

APPENDIX B-6

Notice of Appeal,
October 15, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

No. 3-82-21

Betty Phillips
Route 1, Box 426
Seymour, Tennessee 37865
Plaintiff

vs.

TVA Engineering Association, Inc., et al
Defendants

NOTICE OF APPEAL

Notice is hereby given that Betty Phillips, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this action on the 7th day of October, 1982.

THIS the 15th day of October, 1982.

/s/ KEVIN E. MARCH
Attorney for Plaintiff

Kevin E. March
Attorney at Law
11167 Kingston Pike
Knoxville, TN 37922
(615) 966-4343

APPENDIX B-7

Memorandum and Order
November 10, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. Civ-3-82-21

Betty Phillips,
Plaintiff,

v.

TVA Engineering Association, Inc., et al.,
Defendants.

MEMORANDUM AND ORDER

On October 7, 1982, the undersigned entered final judgment in this Title VII action on behalf of the defendants. The defendants were allowed 10 days in which to petition the Court for attorney's fees supported by verified and detailed itemization of the time expended and expenses incurred in connection with this cause. Such a petition was filed on October 14, 1982.

On October 15, 1982, the plaintiff filed a timely notice of appeal from both the judgment and the award of attorney's fees. However, plaintiff takes the position that this court is powerless to make the actual award determining the proper amount of fees because her appeal deprives this court of jurisdiction over the matter at hand. Implicit in the Supreme Court's decision of *White v. New Hampshire Department of Employment Security,* 102 S. Ct. 1162, 1168 (1982) is the notion that district courts should avoid piecemeal appeals by promptly hearing and deciding claims for attorney's fees. This would permit an ap-

peal from the fee award to be considered together with the appeal from a final judgment on the merits. *See also Obin v. Dist. No. 9 of International Assoc. of Machinists, etc.*, 651 F.2d 574, 584 (8th Cir. 1981). In the interests of judicial economy, the defendants' petition shall be considered.

The prevailing party in civil rights litigation should be paid "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 633 (6th Cir. 1979), *cert. denied* 447 U.S. 911 (1980); *see also Horace v. City of Pontiac,* 624 F.2d 765 (6th Cir. 1980) (Title VII). The defendants' attorneys attest by affidavit that Bernard E. Bernstein, Esq., expended 54 hours on this litigation and that Doris C. Allen, Esq., spent 166.25 hours. A log of their professional services is appended to their petition detailing the work actually done. Mr. Bernstein's hours are billed at a rate of $90.00 per hour (with the exception of 2.5 hours at an initial conference which were billed at $100.00 per hour). Ms. Allen's time is billed at $70.00 per hour. The undersigned finds these hourly rates, the number of hours expended, and the actual services performed to be reasonable in light of this litigation, the experience of these attorneys, and the fees customarily charged in this jurisdiction.

These attorneys have also itemized $963.57 of out-of-pocket expenses for such items as photocopies, long distance telephone calls, depositions, and Federal Express charges. The authority given the courts to grant reasonable attorney's fees also includes the authority to award reasonable out-of-pocket expenses. *Northcross, supra,* at 639. The undersigned finds these itemized expenses to be reasonable under the circumstances of this litigation.

The defendants' attorneys attest that they have already billed their clients for these services and expenses totaling $17,481.07 and that this bill has been paid in full. Therefore, it is hereby

ORDERED that the plaintiff reimburse the defendant TVAEA for this amount.

ENTER: Nov. 10, 1982

/s/ Robert P. Murrian
United States Magistrate

APPENDIX B-8

**Petition To Rehear En Banc In
The Court Of Appeals For The Sixth Circuit
December 30, 1983**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5663

Betty C. Phillips,
Plaintiff-Appellant,

v.

TVA Engineering Association, Inc.,
Vernon Drake, James Eickman,
Ken Smith, Kathy Watson, and
Patricia Lyon (Cureton),
Defendants-Appellees.

Appeal from U.S.
District Court For
The Eastern District
Or Tennessee,
Northern Division

PETITION TO REHEAR OR REHEAR EN BANC

Comes the Plaintiff, by and through her attorney, and petitions the Court to grant her a rehearing or rehearing en banc. In support of said petition Plaintiff relies on her Brief On Behalf of Appellant and Response To Defendants' Brief, and files a memorandum.

I express a belief, based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit and the Supreme Court of the United States

and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

1. *Detroit Police Officer's Association v. Young,* 608 F.2d 671 (6th Cir. 1979) *cert. denied* 101 S. Ct. 1079 (1979).

2. *Harrington v. Vandalia-Butler Board of Education,* 585 F.2d 192 (6th Cir. 1978), *cert. denied,* 99 S. Ct. 2053 (1979).

3. *Sutton v. National Distillers Products Co.,* F.2d 936 (6th Cir. 1980).

4. *Christenburg Garment Co. v. EEOC,* 434 U.S. 412, 422 (1978).

5. *Griggs v. Duke Power Co.,* 91 S. Ct. 849 (1971).

6. *United States v. United States Gypsum Co.,* 68 S. Ct. 525 (1948) 333 U.S. 364.

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance.

1. Should the Court give little weight to trial testimony that is in conflict with contemporaneous documents.

2. Does acceleration of disciplinary procedures, disparate treatment, and or the filing of counter charges of libel and slander as set out in the EEOC Decisions constitute arguable legal merit of a sex harassment/retaliation case?

3. Should the Court award attorney's fees to a successful Defendant in a sex harassment/retaliation case when the Plaintiff has presented issues of arguable legal or factual merit?

4. Does the award of over Seventeen Thousand Dollars ($17,000.00) in attorney's fees to a successful Defendant in a sex harassment/retaliation case pose an unacceptable chill on future plaintiffs?

5. Should the standard review be: an independent examination of whether the Defendants' actions, as a matter of law, were proscribed under Title VII; and was the district court's conclusion of no discrimination erroneous, as set out in *Detroit Police Officers' Association v. Young*, 608 F.2d 671 (1979); or the clearly erroneous standard used by the panel.

This 30 day of December, 1983.

KEVIN E. MARCH
Attorney of Record for:
Betty C. Phillips

APPENDIX B-9

**Order Denying Petition To Rehear En Banc,
Court Of Appeals For The Sixth Circuit
January 26, 1984**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5663

Betty C. Phillips,
Plaintiff-Appellant,

v.

TVA Engineering Association, Inc.,
Vernon Drake, James Eickman,
Ken Smith, Kathy Wilson, and
Patricia Lyon (Cureton),
Defendants-Appellees.

ORDER

Before: MERRITT and KENNEDY, Circuit Judges; and PRATT,* District Judge.

---

* Honorable Philip Pratt, United States District Court for the Eastern District of Michigan, sitting by designation.

The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE
COURT
/s/ John P. Hehman
Clerk

APPENDIX C

Statutes

28 U.S.C. § 631

(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate shall be for a term of four years, except that the term of a full-time or part-time magistrate appointed under subsection (j) shall expire upon—

(1) the expiration of the absent magistrate's term,

(2) the reinstatement of the absent magistrate in regular service in office as a magistrate,

(3) the failure of the absent magistrate to make timely application under subsection (i) of this section for reinstatement in regular service in office as a magistrate after discharge or release from military service,

(4) the death or resignation of the absent magistrate, or

(5) the removal from office of the absent magistrate pursuant to subsection (h) of this section, whichever may first occur.

28 U.S.C. § 634. Compensation

(a) Officers appointed under this chapter shall receive as full compensation for their services salaries to be fixed by the conference pursuant to section 633 of this title, at rates for full-time and part-time United States magistrates not to exceed the rates now or hereafter provided for full-time and part-time referees in bankruptcy, respectively, referred to in section 40a of the Bankruptcy Act (11 U.S.C. 68(a), as amended, except that the salary of a part-time United States magistrate shall not be less than $100 nor more than one-half the maximum salary payable to a full-time magistrate. In fixing the amount of salary to be paid to any officer appointed under this chapter, consideration

shall be given to the average number and the nature of matters that have arisen during the immediately preceding period of five years, and that may be expected thereafter to arise, over which such officer would have jurisdiction and to such other factors as may be material. Disbursement of salaries shall be made by or pursuant to the order of the Director.

(b) Except as provided by section 8344, title 5, relating to reductions of the salaries of reemployed annuitants under subchapter III of chapter 83 of such title and unless the office has been terminated as provided in this chapter, the salary of a full-time United States magistrate shall not be reduced, during the term in which he is serving, below the salary fixed for him at the beginning of that term.

28 U.S.C. § 636

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time SUnited States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

42 U.S.C. § 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(c) Labor organization. It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to

refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-5 Enforcement Provisions

(k) Attorneys fee. In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

29 C.F.R. § 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.' Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment. (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Office-Supreme Court, U.S.
FILED
JUL 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1732

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

BETTY C. PHILLIPS,
Petitioner

v.

T.V.A. ENGINEERING ASSOCIATION, INC., VERNON DRAKE, JAMES EICKMAN, KEN SMITH, KATHY WATSON, and PATRICIA LYON (CURETON),
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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July 10, 1984

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. §636(c)(1) and (3) violate Article III of the United States Constitution by authorizing entry of final judgments and direct review in the Courts of Appeals upon consent of the parties by United States Magistrates.

2. Whether a writ of certiorari should be granted to reexamine factual findings which were concurred in by the Magistrate and the Court of Appeals.

3. Whether the alleged incompetence of Petitioner's counsel in this civil case is a basis for overturning the Court's finding that discrimination did not exist.

4. Whether the constitutionality of 28 U.S.C. §636(c) and/or the alleged coercion of consent to refer the case to the Magistrate can be raised for the first time in a Petition for Writ of Certiorari to this Court.

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No. 83-1732

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

BETTY C. PHILLIPS,
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v.

T.V.A. ENGINEERING ASSOCIATION, INC., VERNON DRAKE, JAMES EICKMAN, KEN SMITH, KATHY WATSON, and PATRICIA LYON (CURETON),
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondents file this Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner in this cause seeking a review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 5, 1983.

OPINION BELOW

The unreported opinion of the Court of Appeals appears in Appendix A to the Petition for Writ of Certiorari filed by the Petitioner herein. The Opinions of the Magistrate appear in Appendix B-3 and B-4 of the Petition for Writ of Certiorari filed by the Petitioner herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All constitutional provisions, statutes, regulations, and rules are set forth in Appendix C to the Petition for Writ of Certiorari or in Appendix D to this Brief.

STATEMENT OF THE CASE

Petitioner, Betty Phillips, was hired on June 7, 1979, by the Respondent T.V.A. Engineering Association, Inc. (hereinafter "TVAEA"), a labor organization representing employees of the Tennessee Valley Authority. She was terminated in June, 1981. (Magistrate's Memorandum Opinion at Appendix B-4, page A-16 of the Petition for Writ of Certiorari filed by the Petitioner herein, hereinafter referenced as "App. B-4 at p. "; Opinion of the United States Court of Appeals for the Sixth Circuit contained in Appendix A of the Petition for Writ of Certiorari at page A-2, hereinafter referenced "App. A at p. "). Ms. Phillips had satisfactory work evaluations through December, 1980, though she did have some problems with interpersonal relations during that time (App. A at p. A-2).

Beginning in February 1981, Ms. Phillips began to have serious problems with interpersonal relations in the work environment (App. A at p. A-2). The record is clear that on many occasions Ms. Phillips openly or impliedly threatened lawsuits against her supervisor and persons with whom she worked (App. A at p. A-2 and App. B-4 at p. A-19). Further, Ms. Phillips deliberately refused to speak to some members of the TVAEA staff with whom she worked. This resulted in tension in the office (App. A at p. A 2, A-3 and App. B-4 at p. A-20)

In March, 1981 the Executive Committee of TVAEA held a meeting and directed Ms. Phillips' supervisor to remedy problems that had been created within the TVAEA office by Ms. Phillips (App. A at p. A-2 and A-3). The Executive Director and Supervisor, Mr.

Eickman and Vernon Drake, President of TVAEA, held a meeting with Ms. Phillips in March, 1981 for the purpose of warning her that further threats against members of TVAEA and/or her supervisor could result in her termination (App. A at p. A-3 and App. B-4 at p. A-19). Ms. Phillips refused to accept the criticisms of her superiors, used foul language and swore at her supervisor, and continued to threaten to sue her supervisor if he disciplined her in any way (App. A at p. A-3 and App. B-4 at p. A-19). Between March 16, 1981 and May 15, 1981 Mr. Eickman continued to meet with Ms. Phillips to try to correct her misconduct and she continued to deny blame for the office tensions and continued to threaten her supervisor (App. A at p. A 3 and App. B-4 at p. A-19). Because Ms. Phillips' conduct was not improving and because her misconduct was adversely impacting the TVAEA office, Mr. Eickman recommended Ms. Phillips termination at an Executive Committee meeting held on May 15, 1981. At that time he presented a report concerning Ms. Phillips' misconduct (App. A at p. A-3 and App. B-4 at p. A-21).

The Executive Committee invited Ms. Phillips to address the May 15 meeting concerning her proposed termination. She first presented general grievances regarding her work situation and complaints regarding her supervisor. At the end of her presentation, she charged that Mr. Eickman had harassed her sexually by holding money out to her, standing very close to her, and saying in a seductive voice "would you like to make a little extra money?" (App. A at p. A-3 and App. B-4 at p. A-19 thru A-21).

Because of Ms. Phillips' charges of sexual harassment, the Executive Committee determined not to act upon her proposed termination and a committee was appointed to investigate her charges (App. A at p. A-3 and App. B-4 at p. A-21). The committee investigated the charges by speaking with each and every TVAEA employee regarding the office situation generally and spe-

4. Involvement in any unauthorized strike, work stoppage, slowdown, or any other activity having the effect of curtailing the work or otherwise disrupting the job.

5. Failure to return to work, when involved in a violation of the Agreement, as instructed by either a Local Lodge or International officer of the Union.

6. Insistence on recognizing illegal or unauthorized picket lines.

7. Interference with proper administration or referral procedures.

NOTE: All penalties imposed under this article shall be reported immediately on the appropriate form to the National Joint Rules and Standards Committee. Penalties for violations under paragraphs 4, 5, 6 and 7 of Section 7.3 will be applied nationwide by the National Joint Rules and Standards Committee.

Section 7.4 Violations disruptive of the industry, such as acts of violence, acts of sabotage or serious chronic violations of referral rules will be referred to the National Joint Rules and Standards Committee for action. Such violations shall be cause for serious disciplinary action up to and including permanent removal from all out-of-work lists governed by the National Joint Rules and Standards.

Section 7.5 Employers shall cooperate with the Union by giving to the appropriate union official adequate oral and written report of all terminations, stating time, date, and reason.

Article 8. Change or Modification

The Rules, Regulations and Standards may be changed or modified from time to time by the Joint Referral Rules

Committee, subject to the provisions of Article 2, Section 2.3.

Article 9. General Savings Clause

It is not the intent of the Joint Referral Rules Committee in operating under the Rules, Regulations and Standards set forth herein to violate any laws or any rulings of any governmental authority or State agency having jurisdiction of the subject matter contained herein, and it is understood and agreed between the members of the Joint Referral Rules Committee that, in the event any provision or provisions of the Rules, Regulations and Standards shall be held to be contrary to law, it shall not affect any other provisions hereof.

EFFECTIVE as amended this 26 day of September, 1978.

AREA JOINT REFERRAL
COMMITTEE

For the Employers:

David Hovey
Melvin Wiltsie
J. J. Doyle
Keith Dean

For the Union:

Local 29—Boston, Mass.
Walter Rees
Local 175—Oswego, N. Y.
Kenneth Oswald
Local 197—Albany, N. Y.
A. Rossi
Local 237—Hartford, Conn.
D. Dupuis

Approved February 16, 1978
National Joint Rules and Standards
Committee

For the Union:

/s/ Charles W. Jones
/s/ David L. Lewis
/s/ Joseph C. Meredith

For the Employers:

/s/ R. N. McGlothlin
/s/ J. F. Erickson
/s/ R. B. Sierra

Representing the Employers:

/s/ J. L. Darus, Chairman
/s/ G. Roth, Sec.-Treas.
/s/ D. C. Hovey
/s/ J. J. Doyle
/s/ D. Freeman
/s/ W. Osborne
/s/ P. Wiltsie

Representing the Union:

/s/ H. Nacey, Chairman
/s/ David Dupuis, Secy.
/s/ A. L. Rossi
/s/ Fredrick Hayes
/s/ Kenneth Oswald

This Agreement, as negotiated by the foregoing committees at Boston, Massachusetts, is hereby accepted by the parties signatory hereto this ..... day of ....., 19....., with the full understanding that this Agreement is between the Union and the individual signatory Employers.

Representing the Union:

/s/ H. Nacey, Chairman
/s/ David Dupuis, Secy.
/s/ A. L. Rossi
/s/ Fredrick Hayes
/s/ Kenneth Oswald

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